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SPRINGFIELD

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FILE NO. S-1164

**TRANSPORTATION:**

Department of Transportation's  
Authority of Contract  
for Railroad Maintenance Work

Langhorne Bond, Secretary  
Department of Transportation  
2300 Dirksen Parkway  
Springfield, Illinois 62764

Dear Mr. Bond:

I have your letter wherein you ask the following  
two questions:

1. Is the Department of Transportation authorized to contract directly with a contractor other than ConRail or the Penn Central Transportation Company to carry out needed maintenance work on rail lines that the State of Illinois subsidizes pursuant to sections 49.25a through 49.25g of the Civil Administrative Code?

2. In view of the fact that the State is still negotiating with Penn Central for the lease of these rail lines, does section 2 of "AN ACT to

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punish fraud or extravagance in the expenditure of monies appropriated for public improvements" prohibit the State from contracting for the maintenance work?

On April 1, 1976 the greater part of the transportation properties of the Penn Central Transportation Company (Penn Central) and other railroads in reorganization operating in the Northeast and Midwest Region of the United States were conveyed to the Consolidated Rail Corporation (ConRail) and other acquiring railroads under the terms of the Final System Plan developed pursuant to the Regional Rail Reorganization Act of 1973. (45 U.S.C. 701 et seq.) The Act provides that rail services over a line not included in the Final System Plan may be terminated unless a State or some responsible person offers a rail service continuation subsidy. The Act further states that the federal government will provide financial assistance to States that offer rail service continuation subsidies. Section 402(c) of the Act (45 U.S.C. 762(c)) explains how a State may become eligible for this federal assistance. Section 402(c) reads in pertinent part as follows:

"(c) Eligibility.— (1) A State in the region is eligible to receive financial assistance pursuant to subsection (b) of this section if, in any fiscal year -

(A) the State has established a State plan for rail transportation and local rail services (herein referred to as the 'State rail plan') which is administered or coordinated by a designated State agency and such plan includes a suitable process for updating, revising, and amending such plan and provides for the equitable distribution of such financial assistance among State, local, and regional transportation authorities;

(B) the State agency (i) has authority and administrative jurisdiction to develop, promote, supervise, and support safe, adequate, and efficient rail services, (ii) employs or will employ, directly or indirectly, sufficient trained and qualified personnel, and (iii) maintains or will maintain adequate programs of investigation, research, promotion, and development with provision for public participation;

(C) the State provides satisfactory assurance that such fiscal control and fund accounting procedures will be adopted as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid under this title to the State; and

(D) the State complies with the regulations of the Secretary issued under this section.

\* \* \*

Public Act 79-834, which became effective on September 5, 1975, added sections 49.25a through 49.25f to

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the Civil Administrative Code (Ill. Rev. Stat. 1975, ch. 127, para. 49.25a to 49.25f). These sections gave the Department of Transportation the powers necessary to make the State of Illinois eligible for federal assistance to help the State pay for rail service continuation subsidies.

Public Act 79-1193, which became effective on February 5, 1976, added section 49.25g to the Civil Administrative Code. This section gives the Department the authority to enter into agreements with ConRail and Penn Central and also gives the Department the power to make rail continuation subsidy payments pursuant to such agreements. Section 49.25g reads in pertinent part as follows:

"Sec. 49.25g. Railroad freight service assistance. The Department shall enter into such agreements with Consolidated Rail Corporation and the estate of the Penn Central Transportation Company as necessary to provide assistance for continuous freight service on lines of railroads within Illinois designated for discontinuation of service by the United States Railway Association Final System Plan and not conveyed to a railroad company other than Consolidated Rail Corporation. The Department shall make rail continuation subsidy payments pursuant to such agreements. Such agreements shall provide for a minimum level of service at least equivalent to that provided in calendar year 1975. Such agreements shall

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conform to relevant Federal law. Rail continuation subsidy payments made pursuant to such agreements must be eligible for Federal reimbursement under Section 402 of the Regional Rail Reorganization Act of 1973, as amended.

\* \* \*

Section 49.25g does not require the Department to pay all rail continuation subsidies to either ConRail or Penn Central. The section merely provides that the Department shall pay subsidies pursuant to its agreements with ConRail and Penn Central. Rail continuation subsidies include expenditures for the maintenance of rail properties (49 C.F.R. § 255.1(q)). Therefore, section 49.25g authorizes the Department to pay for rail maintenance work pursuant to its agreements with ConRail and Penn Central. It is not necessary that maintenance work which may be provided for in these agreements be done by ConRail or Penn Central.

On March 23, 1976, the Department of Transportation and ConRail entered into an operating agreement for continuation of rail services on Penn Central lines. The agreement provides the Department can contract directly with a third party for railroad maintenance work. According to the authority granted to the Department in section 49.25g, the

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Department can pay a third party for maintenance work pursuant to this provision in the ConRail operating agreement. Therefore, in answer to your first question, it is my opinion that the Department of Transportation may contract for rail maintenance work with someone other than ConRail or Penn Central.

In response to your second question, section 2 of "AN ACT to punish fraud or extravagance in the expenditure of monies appropriated for public improvements" (Ill. Rev. Stat. 1975, ch. 127, par. 132.52) prohibits the commencing of action on a public work or public improvement until the State has a title to the land needed for the work or improvement. Section 2 reads in pertinent part as follows:

"Any person or persons, commissioner or commissioners, or other officer or officers, entrusted with the construction or repair of any public work or improvement, as set forth in Section 1, who shall expend or cause to be expended upon such public work or improvement, the whole or any part of the moneys appropriated therefor, or who shall commence work, or in any wise authorize work to be commenced, thereon, without first having obtained a title, by purchase, donation, condemnation or otherwise, to all lands needed for such public work or improvement, running to the People of the State of

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Illinois; said title to be approved by the Attorney General, and his approval certified by the Secretary of State and placed on record in his office, shall be deemed guilty of a Class A misdemeanor, \* \* \*

Because the State of Illinois is still negotiating the terms of compensation to be paid to the Penn Central for the use of its rail lines, you are concerned that section 2 might prohibit the commencement of maintenance work on the Penn Central's lines until the negotiations are completed.

Even if it is assumed that the railroad maintenance work is a public work and that the State does not have title to lines that are to be improved, it is my opinion that the special provisions of Public Acts 79-834 and 79-1193 must prevail over any prohibition in section 2.

Public Acts 79-834 and 79-1193 establish a new method for continuing rail service in Illinois. As a subsidizer of rail service the State is authorized to enter into agreements with Penn Central for the use of its rail lines. The Rail Reorganization Act of 1973 does not anticipate or require the State to receive title to the real estate on which the rail lines run. The State need only reach agree-

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ment with Penn Central on the use of its rail lines for the continuation of rail service. Because the State's payment for rail service necessarily includes expenditures for the maintenance of the rail lines, it must be concluded that the legislature intended to authorize the Department to maintain the Penn Central lines even though the State may not have title to the property on which these lines run.

The fact that the State is still negotiating with Penn Central for the use of its rail lines does not prevent the Department from contracting for the maintenance work. Since the State of Illinois and ConRail have entered into an operating agreement for continuation of rail services on Penn Central lines, the Penn Central is required to make its rail properties available to the State. (45 U.S.C. 744(d)(2).) Because Illinois and other subsidizers of rail services were unable to come to an agreement with Penn Central on the compensation to be paid for the use of the railroad's property, the railroad was reluctant to permit the use of its lines. This problem was remedied by an emergency order of the Interstate Commerce Commission, issued on March 16, 1976, which



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ordered Penn Central to permit the State of Illinois and other subsidizers to use its lines. The effect of the Commerce Commission's order is that the State has the authority to use the Penn Central lines even though agreement on the Penn Central's compensation has not been reached. Based on the Commerce Commission's order of March 16, it is my opinion that the Department has a right to use the Penn Central lines and thus may contract for their maintenance.

Very truly yours,

A T T O R N E Y   G E N E R A L